No. 2023-1527

In the United States Court of Appeals for the Federal Circuit

IN RE: THOMAS D. FOSTER, APC,

Appellant.

On Appeal From United States Patent and Trademark Office
Case No. PTO-1 : 87981611

CORRECTED OPENING BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 23-1527

Short Case Caption In re: Thomas D. Foster, APC

Filing Party/Entity Thomas D. Foster, APC

Instructions:

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Date: 01/25/2024

Signature: /S/Thomas D. Foster

Name: Thomas D. Foster

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Thomas D. Foster, APC		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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STATEMENT OF RELATED CASES

Applicant, Thomas D. Foster, APC, has a pending trademark application, Serial No.: 8783906, for US SPACE FORCE for use in connection with services presently identified in Classes 035, 041 and 042. This "daughter" application was created by dividing the application which is the subject of this appeal.

INTRODUCTION

Applicant intellectual property law firm has represented several entertainment ventures over the years and knows the critical importance of early acquisition of trademark rights for the merchandise that is usually associated with a successful entertainment franchise. The filing of U.S. Trademark Application Serial No. 87/981,611, the Subject Application, took place on March 19, 2018, just six days after Applicant heard the speech given by President Donald Trump at the Miramar Marine Corps Air Station on March 13, 2018 in which he joked that he wished to create a new military branch which he would like to call the "space force." This vision of a space force rekindled childhood memories of the excitement that surrounded America's race to be the first to land on the Moon and inspired Applicant to envision and develop an entertainment franchise based around the term.

Applicant's initial concept involved a movie or comic book franchise which would pay homage to the 1987 animated syndicated U.S. television series, Starcom: The U.S. Space Force, which was inspired by a motorized toy franchise

manufactured by Coleco. (Appx0130-0133). Prior to filing the Subject Application, Applicant conducted a search of the US Trademark records and determined that while several others had successfully registered the marks UNITED STATES SPACE FORCE, US SPACE FORCE, and SPACE FORCE, for a variety of goods and services, none of those registrations were subsisting or the marks were not in use. Applicant was drawn to the term US SPACE FORCE because of the patriotic connotation that would be associated with it. The term SPACE FORCE does not have the same inspiring connotation as US SPACE FORCE. The term SPACE FORCE is a neutral generic term. However, the term US SPACE FORCE is rich with positive connotations associated with the American Dream of equality of opportunity, the God-given ability to strive for the highest aspirations, and helping those less fortunate and those that are in danger.

Applicant's creative focus has since matured and Applicant is now intent on producing a movie or comic book franchise built around a fictional federal marshal acting in outer space (i.e., U.S. Space "Police" Force). This concept comes from such classic Space Westerns such as Outland, the 1981 science fiction film starring Sean Connery where he plays Federal Marshal William O'Niel stationed on a mining outpost on a moon of Saturn. In this movie he fights a dangerous drug smuggling ring which is secretly run by the heads of the mining company. Law enforcement in space certainly creates an intriguing storyline for rich character development and

subsidiary merchandise opportunities. Like early Federal Marshals, Applicant's US SPACE FORCE Marshals will apprehend wanted fugitives, protect judges and witnesses, transport prisoners, operate a Witness Security Program and form a posse. The main character(s) will be fresh and new and not straight out of Central Casting.

Contrary to the misapprehensions relied upon by the Trademark Trial and Appeal Board and the Examining Attorney, Applicant is not seeking to falsely suggest to the public that it is associated with a military force. The public will readily perceive Applicant's use of US SPACE FORCE as a movie or comic book franchise built on a plot which revolves around a fictional law enforcement agency which operates in the remote lawless frontiers of space.

This appeal concerns, in large part, the conflict between trademark rights and freedom of expression. The uncertainty as to what term might be deemed falsely suggesting a connection with a famous person or entity is a real concern for artists. This uncertainty is confirmed by the record of USPTO grants and denials over the years, from which the public would have a hard time drawing much reliable guidance. Such uncertainty of speech-affecting standards has long been recognized as a First Amendment problem, e.g., in the overbreadth doctrine. *See Broadrick v. Oklahoma*, 413 U.S. 601, 613, 615, 93 S. Ct. 2908, 37 L.Ed.2d 830 (1973). It can be recognized as a problem under the Fifth Amendment vagueness standards as they have been specially applied in the First Amendment setting. This uncertainty

contributes significantly to the chilling effect on the free speech of artists such as the Applicant.

The disincentive for an artist to choose a particular mark extends to any mark that could require the expenditure of substantial resources in litigation to obtain registration in the first place. And the disincentive does not stop there, because the even if an author obtains a registration initially, the mark may be challenged in a cancellation proceeding many years later since there is no time bar under a claim brought under the false suggestion of a connection provisions of 15 U.S.C. § 1052(a).

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this *ex parte* appeal of the September 19, 2022 final decision (Appx0003-0022) of the Trademark Trial and Appeal Board ("the Board"), which affirmed the refusal by the United States Patent and Trademark Office ("USPTO") to register Applicant's trademark pursuant to § 2(a) of the Lanham Act, 15 U.S.C. § 1052(a). *See* 28 U.S.C. § 1295(a)(4)(B) and 15 U.S.C. § 1071(a)(1). Applicant timely filed its Notice of Appeal on February 13, 2023. (Appx0034-0038) 15 U.S.C. § 1071(a)(2); 37 C.F.R. § 2.145(d).

STATEMENT OF THE ISSUES ON APPEAL

This appeal involves an intent-to-use application to register the trademark US SPACE FORCE ("the Mark") for the following goods:

"Metal license plates; Metal novelty license plates; Souvenir license plates of metal" in International Class 006.

"License plate frames; License plate holders" in International Class 012.

"Collectible coins; Commemorative coins; Lapel pins; Ornamental lapel pins; Jewelry pins for use on hats; Jewelry; Watches; Clocks; Decorative key fobs of common metal; leather key chains" in International Class 014.

"Coloring Books; Posters; Greeting cards; Note cards; Postcards and greeting cards; Spiral-bound notebooks; Decals; Bumper stickers; Decorative stickers for helmets; Decals and stickers for use as home decor; Decorative decals for vehicle windows; Printed publications, namely, brochures, booklets, and teaching materials in the field of military history, tactics and doctrine; newsletters on the topic of military training, deployment, and lifestyle for active and inactive military personnel, military families, and friends; Address books; almanacs; appointment books; art prints; arts and craft paint kits; autograph books; baby books; baseball cards; binders; bookends; bookmarks; a series of fiction books; books, magazines, newsletters and periodicals, featuring stories, games and activities for children; calendars; cartoon strips; Christmas cards; chalk; children's activity books; coasters made of paper; coin albums; printed children's coloring pages; comic books; comic strips; coupon books; decorative paper centerpieces; diaries; drawing rulers; dry erase writing boards and writing surfaces; envelopes; erasers; flash cards; gift cards; gift wrapping paper; globes; guest books; general feature magazines; maps; memo pads; modeling clay; newsletters and printed periodicals, featuring stories, games and activities for children; newspapers; note paper; notebooks; notebook paper; paintings; paper flags; paper cake decorations; paper party decorations; paper napkins; paper party bags; paperweights; paper gift wrap bows; paper pennants; paper place mats; pen or pencil holders; pencil sharpeners; pen and pencil cases and boxes; photograph albums; photographs; photo-engravings; pictorial prints; picture books; plastic party goodie bags; plastic shopping bags; portraits; postcards; printed awards; printed certificates; printed invitations; printed menus; recipe books; rubber stamps; score cards; stamp albums; stationery; staplers; stickers; sports trading cards; collectible trading cards; trading cards,

other than for games; ungraduated rulers; writing paper; writing implements; paper handkerchiefs" in International Class 016.

"Umbrellas; Beach bags; Book bags; Canvas shopping bags; Drawstring bags; Duffel bags; Gym bags; Reusable shopping bags; School bags; Sport bags; Tote bags; Wash bags sold empty for carrying toiletries; all-purpose carrying bags; all-purpose sports bags; baby backpacks; backpacks; calling card cases; coin purses; diaper bags; fanny packs; handbags; knapsacks; key cases; leather key chains; luggage tags; luggage; overnight bags; purses; satchels; shopping bags made of leather, mesh and textile; waist packs; wallets" in International Class 018.

"Accent pillows; Bed pillows; Floor pillows; Novelty pillows; Pillows; Picture and photograph frames; Picture frames; Wind chimes" in International Class 020.

"Mugs; Coffee mugs; Bottle openers; Buckets; Plastic cups; Shot glasses; Water bottles sold empty; Heat-insulated containers for household use; Non-electric portable beverage coolers; Thermal insulated containers for food or beverages; Utensils for barbecues, namely, forks, tongs, turners; Beer glasses; Beverage glassware; Bottle stoppers specially adapted for use with wine bottles; Coolers for wine; Cooling buckets for wine; Cups and mugs; Drinking flasks; Drinking glasses; Flasks; Glass beverageware; Glass mugs; Heat-insulated vessels; Hip flasks; Insulated flasks; Pilsner drinking glasses; Wine cooling pails; Wine glasses' Bakeware; beverageware; bowls; brooms; busts of ceramic, crystal, china, terra cotta, earthenware, porcelain and glass; cake pans; cake molds; candle holders not of precious metal; candle snuffers; candlesticks; canteens; coasters not of paper or textile; cookie jars; cookie cutters; cork screws; cups; decorating bags for confectioners; decorative crystal prisms; decorative glass not for building; decorative plates; dinnerware; dishware; dishes; figurines made of ceramic, china, crystal, earthenware, glass, and porcelain; Hair brushes; combs; household containers for food and beverages; insulating sleeve holders for beverage containers; Non-electric tea kettles; lunch boxes; lunch kits comprising of lunch boxes and beverage containers; napkin holders; napkin rings not of precious metals; non-metallic trays for domestic purposes, namely, valet trays; serving trays; pie pans; pie servers; plates; non-electric portable coolers;

removable insulated sleeve holders for drink cans and bottles; servingware for serving food; sports bottles sold empty; soap dishes; tea pots; tea sets; toothbrushes; trivets; vacuum bottles; waste baskets; drinking straws; barbecue mitts; oven mitts; pot holders; thermal insulated containers and bags for food or beverages" in International Class 021.

"Cloth flags; Fabric flags; Afghans; bath linen; bath towels; bed blankets; bed canopies; bed linen; bed sheets; bed skirts; bed spreads; blanket throws; calico; children's blankets; cloth coasters; cloth doilies; cloth pennants; comforters; crib bumpers; curtains; felt pennants; golf towels; hand towels; textile handkerchiefs; hooded towels; household linens; kitchen towels; pillow cases; pillow covers; plastic table covers; quilts; receiving blankets; silk blankets; table linen; table napkins of textile; textile place mats; textile tablecloths; throws; towels; washcloths; woolen blankets" in International Class 024.

"Action figure toys; Collectable toy figures; Model toy vehicles; Modeled plastic toy figurines; Molded toy figures; Playing pieces in the nature of miniature action figures and toy model vehicles for use with table top hobby battle games in the nature of battle, war and skirmish games, and fantasy games; Positionable toy figures; Toy action figures and accessories therefor; Action target games; Toy spacecraft; Toy rockets; Toy space vehicles; Toy figures; Toy vehicles; Toy weapons; Scale model spacecraft; Scale model rockets; Scale model space vehicles; Christmas tree decorations; Christmas tree ornaments; Action skill games; board games; children's multiple activity toys; badminton sets; balloons; basketballs; bath toys; baseball bats; baseballs; beach balls; bean bags; bean bag dolls; toy building blocks; bobblehead dolls; bowling balls; bubble making wand and solution sets; chess sets; toy imitation cosmetics; Christmas stockings; Christmas tree ornaments and decorations; crib mobiles; crib toys; disc toss toys; doll clothing; equipment sold as a unit for playing card games; fishing tackle; footballs; golf balls; golf gloves; golf ball markers; hand-held units for playing electronic games for use with or without an external display screen or monitor; hockey pucks; hockey sticks; infant toys; inflatable toys; jump ropes; kites; magic tricks; marbles; manipulative games; music box toys; party favors in the nature of small toys; paper party hats; puppets; roller skates; role playing toys in the nature of play sets for children to imitate real life occupations; rubber balls; skateboards;

> snow boards; snow globes; soccer balls; spinning tops; table tennis balls; table tennis paddles and rackets; table tennis tables; target games; tennis balls; tennis rackets; toy bucket and shovel sets; toy mobiles; toy scooters; toy cars; toy banks; toy trucks; toy watches; toy building structures and toy vehicle tracks; video game machines for use with televisions; volley balls; wind-up toys; yo-yos; toy trains and parts and accessories therefor; toy aircraft; fitted plastic films known as skins for covering and protecting electronic game playing apparatus, namely, video game consoles, and hand-held video game units; Action figures and accessories therefor; card games; dolls; doll accessories; doll playsets; electric action toys; jigsaw puzzles; mechanical toys; musical toys; parlor games; paper party favors; party games; playing cards; squeeze toys; talking toys; toy sabres; trading card games" in International Class 028.
>
> "Lighters for smokers; Cigar lighters" in International Class 034. (The "Mark").

The Mark was refused registration under 15 U.S.C. § 1052(a). The issues presented for review are as follows:

1. Did the Board err as a matter of law in finding on the record before it in denying registration of the Mark on the grounds that a false association existed under section 2(a) of the Lanham Act, 15 U.S.C. § 1052(a)?

2. Did the Board err in accepting *The Atlantic* and *Newsweek* Articles?

3. Did the Board err in dismissing Applicant's Google survey evidence?

4. Did the Board err in not directing the intent-to-use application to be published?

5. Is 15 U.S.C. § 1052(a) unconstitutional as applied here on the ground that its application was arbitrary and capricious?

6. Is 15 U.S.C. § 1052(a) unconstitutional on its face on the ground of vagueness?

7. Is 15 U.S.C. § 1052(a) unconstitutional as applied here on the ground that it restricts Applicant's First Amendment right to free speech?

STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal of a decision of the Board. The Board held that registration of the Mark should be refused under Section 2(a) of the Lanham Act, 15 U.S.C. § 1052(a). The Board found that a false association exists between Applicant's intended use of the Mark and the U.S. Space Force, a branch of the U.S. Armed Forces.

Applicant asserts that the Board's decision is legal error and not supported by substantial evidence. No false association exists between the Applicant's intended use of the Mark and the U.S. Government. If any such association could be regarded as existing in the minds of consumers based on the evidence presented, it is asserted that 15 U.S.C. § 1052(a) is unconstitutional on its face on the ground of vagueness and its chilling effect on the free speech of artists.

This appeal arises from the Board's September 19, 2022 affirmation of the final refusal (Appx0003-0022) to register the trademark US SPACE FORCE on the Principal Register. The Subject Application, Serial No. 87/981,611, was filed by

Applicant on March 19, 2018, for US SPACE FORCE in standard characters under Applicant's allegation of an intention to use the mark in commerce.

II. Procedural History

On March 19, 2018, Applicant filed its application for US SPACE FORCE based on a Section 1(b) Intent to Use filing basis. (Appx0039-0050) On July 9, 2018, registration was refused (Appx0052-0111) pursuant to Section 2(d) and Section 2(a) of the Trademark Act, with a reference to a prior pending application. Applicant responded on March 20, 2019. (Appx0113-0162) A second non-final action was issued on April 29, 2019 (Appx0171-0344), further refusing registration based on Trademark Act Sections 1, 2, 3 and 45, 15 U.S.C. §§ 1051–1053, 1127, which was later withdrawn.

Applicant responded on July 19, 2019, (Appx0345-0385) amending the identification of services to Classes 35, 41 and 42, later filing a request to divide the application on July 22, 2019 (Appx0386-0391), maintaining Class 35 within this application. The Request to Divide was completed on August 2, 2019 (Appx0398-0402), and the Section 2(a) refusal was made final on November 18, 2019 (Appx0403-0647). A Request for Reconsideration, filed on January 24, 2020 (0648-0681), was denied on March 2, 2020 (Appx0688-0840). On May 15, 2020 Applicant filed its timely Notice of Appeal to the Trademark Trial and Appeal Board. (Appx0841-0843)

Applicant submitted a request for remand on July 1, 2020 (Appx0845-0891), providing additional evidence in support of registration. On August 27, 2020, the Examining Attorney requested a remand (Appx0893-0899) to address an unacceptable identification of goods, with an Office action being issued on October 13, 2020 (Appx0901-1032). Following Applicant's April 5, 2021 response (Appx1033-1059), the Section 2(a) refusal and identification of goods requirement was made final in an Office Action which issued on July 6, 2021. (Appx1066-1280) Applicant filed a request for reconsideration with an acceptable amendment to the identification of goods on September 11, 2021 (Appx1281-1293), and on January 28, 2022, the final Section 2(a) refusal was maintained. (Appx1304-1306) Thereafter, on March 21, 2022, Applicant filed its appeal brief. (Appx1308-1334) On May 23, 2022, The Examining Attorney filed their appeal brief. (Appx1337-1356) The Board issued their decision on September 19, 2022 affirming the refusal to register. (Appx0003-0022) On October 17, 2022 Applicant filed a Request for Reconsideration of the Final Decision. (Appx1357-1363)

The Board issued their decision on December 12, 2022 again affirming the refusal to register. (Appx0023-0033) Therein, the Board clarified the Final Decision having considered Applicant's filing date as a constructive use date for purposes of the false suggestion of a connection refusal on appeal. The Board went on to state that nonetheless, "Applicant has not demonstrated that, based on the record evidence

and the applicable law, the Final Decision is in error. Applicant's proposed mark falsely suggests a connection with the U.S. Government's military forces, specifically, the U.S. Space Force, a branch of the U.S. Armed Forces." (Appx0032) On February 13, 2023 the present Notice of Appeal was filed with the Court of Appeals for the Federal Circuit. (Appx0034-0038)

SUMMARY OF THE ARGUMENT

Applicant challenges the Board's application of the four-factor test for determining whether the Mark should be refused registration because it falsely suggests a connection with another person or entity.

On the date that the Mark was filed, a connection with the U.S. government would not have been presumed.

Under Trademark Act Section 2(a), the registration of a mark that "consists of or comprises matter that may falsely suggest a connection with persons, institutions, beliefs, or national symbols" is prohibited. *In re Pedersen*, 109 USPQ2d 1185, 1188 (TTAB 2013). To establish that an applied-for mark falsely suggests a connection with a person or an institution, the following is required:

> (1) The mark sought to be registered is the same as, or a close approximation of, the name or identity previously used by another person or institution.
>
> (2) The mark would be recognized as such, in that it points uniquely and unmistakably to that person or institution.

> (3) The person or institution identified in the mark is not connected with the goods sold or services performed by applicant under the mark.
>
> (4) The fame or reputation of the named person or institution is of such a nature that a connection with such person or institution would be presumed when applicant's mark is used on its goods and/or services.

In re Pedersen, 109 USPQ2d at 1188-89; *In re Jackson Int'l Trading Co.*, 103 USPQ2d 1417, 1419 (TTAB 2012); TMEP § 1203.03(c)(i); *see also Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 703 F.2d 1372, 1375-77, 217 USPQ 505, 508-10 (Fed. Cir. 1983) (providing foundational principles for the current four-part test used to determine the existence of a false connection). Applicant contests all four factors and the constitutionality of Trademark Act Section 2(a) upon the basis that it is vague, restricts the free speech of artists, and/or violates the Common Law and the Constitution.

STANDARD OF REVIEW

Rulings of PTO tribunals are reviewed by the Federal Circuit in accordance with the standards of the Administrative Procedure Act. *Bridgestone/Firestone Research, Inc. v. Automobile Club De L'Quest De La France*, 245 F.3d 1359, 1361 (Fed. Cir. 2001). Under this standard, review of the Board's legal conclusions is plenary, while its factual findings are upheld "unless they are arbitrary, capricious, or unsupported by substantial evidence." *Id*. The Federal Circuit reviews constitutional challenges *de novo*. *See SKF USA, Inc. v. U.S. Customs & Border Prot.*, 556 F.3d 1337, 1349 (Fed. Cir. 2009).

ARGUMENT

Taking the record as a whole, there is not substantial evidence such that a reasonable mind would accept as adequate to support the Board's conclusion that on the March 19, 2018, Applicant's Mark, US SPACE FORCE, was the same as or a close approximation of a previously used name or identity of the U.S. government.

Taking the record as a whole, there is not substantial evidence such that even today a reasonable mind would accept as adequate to support the Board's conclusion that US SPACE FORCE points uniquely and unmistakably to the U.S. government. The record relied upon by the Examining Attorney and the Board is inadmissible, illogical and in fact directly conflicts with the premise for which it is presented.

It was an abuse of discretion for the Board not to give the Google survey any significant evidentiary weight and a clear error in misstating the results of the Google survey.

Since this is an intent-to-use application and the identification is very broad, the Examining Attorney should wait for the statement of use to be filed before making a decision whether or not to raise a false suggestion of a connection refusal.

The U.S. government is fully aware of this pending application and has the ability to oppose the application or to raise a 2(a) claim later against any registration issuing therefrom.

The false suggestion of a connection provision of the Trademark Act is unconstitutional on its face on the ground of vagueness.

The false suggestion of a connection provision of the Trademark Act is unconstitutional in that it restricts the free speech of artists.

The false suggestion of a connection provision of the Trademark Act is unconstitutional in that it violates the common law and the Constitution.

I. The record lacks substantial evidence that on March 19, 2018 Applicant's mark, US SPACE FORCE, was the same as or a close approximation of a previously used name or identity of the U.S. government.

Appellant lays claim to March 19, 2018, the date the Subject Application was filed, as its constructive use priority date. According to the *Trademark Manual of Examining Procedure* (TMEP) § 201.02 [u]nder 15 U.S.C. § 1057(c) and § 1141f(b), filing any application for registration on the Principal Register, including an intent-to-use application, constitutes constructive use of the mark, provided the application matures into a registration. *See Cent. Garden & Pet Co. v. Doskocil Mfg. Co.*, 108 USPQ2d 1134 (TTAB2013). Upon registration, filing affords the applicant nationwide priority over others, except: (1) parties who used the mark before the applicant's filing date; (2) parties who filed in the USPTO before the applicant; or (3) parties who are entitled to an earlier priority filing date based on the filing of a foreign application under 15 U.S.C. § 1126(d) or § 1141g (see TMEP § 206.02). *See Zirco Corp. v. Am. Tel. & Tel. Co.*, 21 USPQ2d 1542 (TTAB1991); *Aktieselskabet*

AF 21. November 2001 v. Fame Jeans Inc., 525 F.3d 8, 86 USPQ2d 1527 (D.C. Cir. 2008). (Appx1361-1362)

The only evidence in the record of President Trump using the term "space force" that predates the March 19, 2018 filing date of the subject application, are two online articles that discuss President Trump's use of the term "space force" in a speech six days earlier on March 13, 2018. The Board relies upon these two articles in its decision upholding the Examining Attorney's refusal for registration. (Appx0029) They are the following:

> *The Atlantic* Article by Marina Koren, "What Does Trump Mean By 'Space Force'?," The Atlantic (online), March 13, 2018 (Appx0692), printout of article (Appx0809-0812). This article appeared in the "SCIENCE" section of this online publication.
>
> *The Newsweek* Article by Shane Croucher. "What is a Space Force? How a Trump Joke Became 'A Great Idea'", Newsweek (online), March 14, 2018 (Appx0692), printout of article (Appx0816-0822).

In the context of Section 2(a) false association, the Board has considered online articles as evidence of public perception, noting that "[w]hile not considered for the truth of any matters asserted therein, the on-line articles are competent to show that the public has been exposed to the term [at issue] and the meaning the public is likely to associate with the term." *Bos. Athletic Ass'n v. Velocity, LLC*, 117 USPQ2d at 1498 (TTAB 2015). Applicant argues, however, that the evidentiary issue here is not that President Trump joked about a "Space Force" but rather how

many people in the United States read those articles in the days leading up to the filing of the subject application. *In re Urbano,* 51 USPQ2d 1776, 1779 (TTAB 1999). These articles fail to show that the authors perceive or refer to former President Trump as US SPACE FORCE or anything of the sort as of the March 19, 2018 filing date or the amount of public exposure there was to President Trump's use of the term prior to that date. *See Nike Inc. v. Maher*, 100 USPQ2d 1018, 1024 n.12 (TTAB 2011) ("The probative value of the news articles is that they show how the authors perceive, or refer to, opposer, and the exposure of the public to Opposer's name."). (Appx1321 and Appx0127-0128)

The Board assumes that these articles were read by a sizeable portion of the U.S. population. Evidence like page views could have easily been obtained by the Examining Attorney and been made part of the official record, but it was not. The record does not indicate the number of views of the pages on which these two articles appear, leaving one to only speculate as to whether visitors to the websites even viewed either of the articles. There is nothing in the record to support the assumption made by the Board that these articles were widely read before March 19, 2018. As such, they are inadmissible hearsay. These on-line articles are not competent to show that the public has been exposed to the term at issue. The Board clearly made an error in accepting these two articles as evidence that the U.S. public had read them.

A. A reasonable person reading *The Atlantic* and *Newsweek* Articles prior to March 19, 2018 would have understood that SPACE FORCE was a generic term used by others before President Trump.

There is no evidence in the record regarding how many people read *The Atlantic* and *Newsweek* Articles prior to March 19, 2018, plus these two online articles appear to target specific audiences, such as those interested in military or defense news, space technology, rather than the general public. (Appx1320)

These articles, however, are competent in that they provide substantial evidence that the term space force was a widely used generic term prior to President Trump's speech. In *The Atlantic* article, the author states:

> "in 2000, a military-reform commission led by Donald Rumsfeld suggested the creation such a force, but the idea fell by the wayside after the September 11, 2001, terrorist attacks and the wars in Afghanistan and Iraq that followed. Last year, the House Armed Services Commiittee approved a measure to create a space corps brought forward by Mike Rogers, a Republican from Alabama, and Jim Cooper, a Democrat from Tennessee." (Appx0811)

In the Newsweek article, the author similarly states:

> "*Trump is not the first person to come up with the concept of a U.S. Space Force. Rep. Mike Rogers, a Republican in Alabama and former chairman of the House Armed Services strategic forces subcommittee, floated the idea of a Space Force in 2017.*" (Appx0819)

These articles clearly show that the public is likely to associate Space Force as a generic term used by others before President Trump.

B. A reasonable person reading *The Atlantic* and *Newsweek* Articles prior to March 19, 2018 would have understood that President Trump was either merely making a wish for a new military force or just making a joke.

There is no evidence in the record regarding how many people read *The Atlantic* and *Newsweek* Articles prior to March 19, 2018, plus these two online articles appear to target specific audiences, such as those interested in military or defense news, space technology, rather than the general public. (Appx1320)

These articles, however, are competent in that they provide substantial evidence that President Trump stated flippantly that he wished for a space force or that he was just making a joke to troll the Fake News.

In *The Atlantic* article, the author quotes President Trump as stating the following:

> "*I said, maybe we need a new force. We'll call it the space force," he said. "And I was not really serious. And then I said, what a great idea. Maybe we'll have to do that. That could happen. That could be the big breaking story.*" (Appx0810)

In the *Newsweek* article, the author similarly quotes President Trump as stating the following:

> "*I said maybe we need a new force, we'll call it the Space Force. And I was not really serious. Then I said "what a great idea, maybe we'll have to do that*.'" *As the audience of Marines laughted and cheered, he added: "That could happen. That could be the big breaking story. Oh that fake news.*" (Appx0817-0818)

These articles clearly show that the public is likely to associate Space Force to be part of a wish or joke made by President Trump.

C. A reasonable person reading *The Atlantic* Article Prior to March 19, 2018 would have understood that the power lay with Congress to create any new military branch.

There is no evidence in the record regarding how many people read *The Atlantic* Article prior to March 19, 2018, plus this online article appears to target specific audiences, such as those interested in military or defense news, space technology, rather than the general public. (Appx1320)

This article, however, is competent in that it provides substantial evidence that it would take an act of Congress before any new military branch was created.

In *The Atlantic* article, the author states:

> "*in 2000, a military-reform commission led by Donald Rumsfeld suggested the creation such a force, but the idea fell by the wayside after the September 11, 2001, terrorist attacks and the wars in Afghanistan and Iraq that followed. Last year, the House Armed Services Commiittee approved a measure to create a space corps brought forward by Mike Rogers, a Republican from Alabama, and Jim Cooper, a Democrat from Tennessee. . . . The measure made it into the House's version of an annual defense bill, but the Senate's version banned it. The Pentagon stood by in its opposition, which was carried over from the Obama administration. Congress passed their final bill in November with no mention of the space corps*." (Appx0811)

Even assuming for arguments sake that President Trump did have the powers of a wartime president, such as those wielded by Abraham Lincoln during the Civil War, and he created a new branch of the military called US SPACE FORCE prior to

March 19, 2018, the evidence put forth by the Examining Attorney does not mention any such powers or orders. In fact, the articles make no mention of a statement from President Trump that he was suspending the Constitution and that he decreed the immediate creation of a new military branch.

This article clearly shows that the public is likely to understand that Space Force did not exist at that time.

D. A reasonable person reading *The Atlantic* Article prior to March 19, 2018, would have expected Congress to call the new military branch the SPACE CORPS.

There is no evidence in the record regarding how many people read *The Atlantic* Article prior to March 19, 2018, plus this online article appears to target specific audiences, such as those interested in military or defense news, space technology, rather than the general public. (Appx1320)

This article, however, is competent in that it provides substantial evidence that Congress was intent on naming any such military branch Space Corps rather than Space Force.

In *The Atlantic* article, the author states:

> "*The idea of a space corps was already a news story – last year. In July, the House of Representatives passed legislation that would direct the Defense Department to create a* "*space corps*" *as a new military service, housed within the Air Force. But the Pentagon – Trump's Pentagon – opposed it.*" (Appx0810)

All that this article shows is that President Trump had flippantly stated a desire for a new branch of the military to be formed which he called a space force. While it appeared that he had a "magic wand" when it came to the economy, he did not have a magic wand with which to instantly create such a military branch out of thin air. In fact, Congress had yet to establish any such branch of the military. Since this branch of the military did not yet exist, it is illogical to say that an institution or person was named in the Subject Application. (Appx1321)

Thus, neither the U.S. Government, President Trump, nor the U.S. Space Force were able to assert rights to the US SPACE FORCE mark at the time that the subject application was filed. There was no legally recognized branch of the U.S. military designated the U.S. Space Force at that time. (Appx1321)

The articles and evidence relied upon by the Examining Attorney fail to show that US SPACE FORCE is either a previously used name or identity of the U.S. Government, President Trump, or the U.S. Space Force or a close approximation of their name or identity, thus the Examining Attorney has failed to prove the first prong of the test. (Appx1321) There is not substantial evidence such that a reasonable mind would accept as adequate to support the Board's conclusion that on March 19, 2018, Applicant's Mark, US SPACE FORCE, was the same as or a close approximation of a previously used name or identity of the U.S. government.

This article clearly shows that the public is likely to understand that Congress was going to call the new military branch the SPACE CORPS.

II. The record lacks substantial evidence US SPACE FORCE points uniquely and unmistakably to the U.S. government prior to March 19, 2018.

A. A reasonable person reading *The Atlantic* and *Newsweek* Articles prior to March 19, 2018 would not find that the evidence shows that US SPACE FORCE points uniquely and unmistakably to only the U.S. Government.

There is no indication how many people read these two articles prior to the March 19, 2018 filing date of the subject application, plus these two online articles appear to target specific audiences, such as those interested in military or defense news, space technology, rather than the general public. (Appx1320)

These articles, however, are competent in that they provide substantial evidence that President Trump was not the first person to use the term to refer to a military force. In the *Newsweek* article, the author states:

> "*Trump is not the first person to come up with the concept of a U.S. Space Force. Rep. Mike Rogers, a Republican in Alabama and former chairman of the House Armed Services strategic forces subcommittee, floated the idea of a Space Force in 2017.*" (Appx0819)

This article clearly shows that the public is likely to understand that US SPACE FORCE does not point uniquely and unmistakably to only the U.S. Government.

B. A reasonable person would find that the evidence put forth by the Applicant shows overwhelmingly that US SPACE FORCE does not point uniquely and unmistakably to only the U.S. Government.

Applicant has submitted overwhelming evidence that shows that US SPACE FORCE does not point uniquely and unmistakably to the U.S. Government. That evidence includes the following:

> Wikipedia article and online fan articles about the 1987 animated syndicated U.S. television series, Starcom: The U.S. Space Force, which Applicant initially planned to revive under the US SPACE FORCE mark. (Appx1322), (Appx0659-0663) and (Appx0669-0672)
>
> Ebay listings for Starcom U.S. Space Force toys (Appx1322-1323), (Appx0660-0663) and (Appx06673-0681)
>
> Declaration of Mr. Winspur (Appx1323) (Appx0855 and Appx089)
>
> Information regarding the Netflix SPACE FORCE series. (Appx1323-1325); (Appx0849-0853) and (Appx0857-0878)
>
> Past U.S. Trademark registrations for the UNITED SPACE FORCE, US SPACE FORCE and SPACE FORCE marks. (Appx1325-1326), (Appx0358) and (Appx0367-0371)
>
> Articles about private sector entities which act as domestic space forces (Appx1326-1328), (Appx0656-0659) and (Appx0666-0668)
>
> Declaration of Dan DiFonzo (Appx1328), (Appx0889)
>
> Declaration from Dan Fallen (Appx1328), (Appx0890)
>
> Arguments that citizen Donald J. Trump and the U.S. government cannot logically be conflated into one single entity. (Appx1329)
>
> The Examining Attorney's failure to identify one specific entity or persona to which the mark points. (Appx0056-0057), (Appx0177),

(App0409-0412), (Appx0909-0910), (Appx1071-1073), (Appx1293), (Appx1329-1330)

A survey conducted by Google (Appx1331-1332), (Appx1053-1058)

There is not substantial evidence in the record such that even today a reasonable mind would accept as adequate to support the Board's conclusion that US SPACE FORCE points uniquely and unmistakably to the U.S. government. The record relied upon by the Examining Attorney and the Board is inadmissible, illogical and in fact directly conflicts with the premise for which it is presented.

III. It was an abuse of discretion for the Board not to give the Google survey any evidentiary weight and a clear error to misstate the survey results.

Applicant relied upon a survey report conducted by Google, (Appx1331-1332 and Appx1053-1058), to support its contention that the term US SPACE FORCE does not point unerringly to the U.S. Government. As part of its report, Google provided the demographics of the survey respondents and their answers.

The Board, while acknowledging that it does not strictly apply the Federal Rules of Evidence in *ex parte* appeals, stated that the survey failed to support Applicant's argument that US SPACE FORCE does not point unerringly to the branch of the U.S. Armed Forces. (Appx0015-0017) That is not what the survey showed. The Google survey clearly showed that the mark does not point unerringly to the U.S. Armed Forces. The Board's logic is clearly erroneous in that they

conceded that at least one-third of the responses do not point to the U.S. Government. (Appx0017)

This Google survey was conducted between March 22, 2021 and April 5, 2021 which involved 1,499 respondents located in the United States. They were presented with one simple and easily understood question with the answers presented in randomized order. This question provided insight into the understanding of the U.S. public as of that time. Specifically, it asked the core question about what the term US SPACE FORCE points uniquely and unmistakably in the mind of the survey takers.

Applicants cannot be expected to spend the tens of thousands of dollars it would cost to have a full blown professionally conducted nation-wide survey supported by expert testimony just to refute a false suggestion of a connection refusal by the Examining Attorney. The question posed by the Google survey was a simple one and directed to the core question - and the answers provided were not leading and gave adequate opportunity for the survey taker to choose "None of these" as an answer.

The answers to this Google survey clearly show that the term US SPACE FORCE does not point unerringly to the U.S. Armed Forces.

By all appearances, this survey is reliable and trustworthy after considering the totality of circumstances under which it was made, and it is more probative on

the point for which it is offered, than any other evidence that the Applicant can obtain through reasonable efforts. See Rule 807 of the Federal Rules of Evidence.

It was an abuse of discretion for the Board not to give the Google survey any significant evidentiary weight. In addition, the Board's logic is clearly erroneous in that they conceded that at least one-third of the responses do not point to the U.S. Government. (Appx0017) Thus, the Board cannot claim that US SPACE FORCE points unerringly to the U.S. Government.

IV. Since this is an intent-to-use application and the identification is very broad, the Board should have followed standard USPTO practice and directed that the application to be published.

The USPTO, as a regular practice, follows a wait-and-see approach for intent-to-use trademark applications when raising refusals. E.g., Failure-to-function - See TMEP § 1202; Merely informational matter - See TMEP § 1202.04; Product Design - See TMEP § 1202.02(f)(i); Goods in Trade - See TMEP § 1202.06(c); Title of a Single Work - See TMEP § 1202.08(f); Names of Authors and Performing Artists - See TMEP § 1202.09(a)(iii); and Marks That Identify Columns and Sections of Printed, Downloadable, or Recorded Publications - See TMEP § 1202.07(a)(iii).

It does not make sense to burden the examining attorney with the task of finding evidence to support a finding that it is commonplace for government agencies to sell or license the sale of each of the identified goods only to have the applicant submit a Statement of Use which is limited to goods which clearly do not falsely

suggest a connection with the government. In this case, the examining attorney need only warn of the possibility of the false suggestion of a connection refusal and wait until a Statement of Use is filed. (Appx0663-0664)

The U.S. government and its military are fully aware of this pending application and can oppose the application during the publication period or raise a false suggestion of a connection claim later against any registration issuing therefrom. The U.S. Air Force has a pending trademark application for clothing (Serial No. 88338255) which has been suspended pending the disposition of the present application. Certainly, the government is cognizant of the present application and is fully capable of opposing its registration if they so choose.

The present identification is very broad and includes such goods as dentifrices (toothpaste), oven mitts and yogurt-based smoothies. The Board should have followed standard USPTO practice and directed that the application be published and for the Examining Attorney to wait until a Statement of Use is filed and then, depending on the exact goods offered through Applicant's online store, to make the decision whether to raise a 2(a) false suggestion refusal.

V. 15 U.S.C. § 1052(a) false suggestion of an association is unconstitutional on its face on the ground of vagueness

A law is unconstitutionally vague when people "of common intelligence must necessarily guess at its meaning." *See, Connally v. General Construction Co.,* 269 U.S. 385 (1926). Whether or not the law regulates free speech, if it is unduly vague

it raises serious problems under the due process guarantee, which is applicable to the federal government by virtue of the Fifth Amendment and to state governments through the Fourteenth Amendment.

The public certainly has a hard time drawing much reliable guidance as to what constitutes the name or identity previously used by another person or institution let alone what is meant by "use." The legislative history does not give any clear guidance nor does the text of the actual statute. It appears the PTO leaves it up to the subjective opinion of the individual trademark examiners to decide what constitutes "use" and the person or institution's "identity." The Trademark Manual of Examining Procedure (TMEP) leaves it open to interpretation, as the first element in the four-part analysis, what exactly is the same as, or a close approximation of, the name or identity previously used by another person or institution. The following is the vague guidance given to the examining attorneys at the USPTO.

> First element. The term at issue need not be the actual, legal name of the party falsely associated with the applicant's mark. *See, e.g., Hornby v. TJX Cos*., 87 USPQ2d 1411, 1417, 1424 (TTAB 2008) (finding TWIGGY to be the nickname of professional model Lesley Hornby); *Buffett v. Chi Chi's, Inc.*, 226 USPQ at 429-30 (finding MARGARITAVILLE to be the public persona of singer Jimmy Buffett). "[A] nickname or an informal reference, even one created by the public, can qualify as an entity's 'identity,' thereby giving rise to a protectable interest." *Bos. Athletic Ass'n v. Velocity, LLC,* 117 USPQ2d 1492, 1496 (TTAB 2015). A term may also be considered the identity of a person "even if the person has not used that term." *In re ADCO Indus. – Techs., L.P.*, 2020 USPQ2d 53786, at *4 (citing *In re Nieves & Nieves LLC*, 113 USPQ2d 1629, 1644 (TTAB 2015); *In re Urbano*, 51 USPQ2d 1776, 1779 (TTAB 1999)). In addition, the fact that a term

> identifies both a particular group of people and the language spoken by some of the members of the group is not evidence that it fails to identify the group. *In re Pedersen*, 109 USPQ 2d at 1190 (rejecting applicant's argument that, because the term LAKOTA identifies a language, it does not approximate the name or identity of a people or institution).
>
> § 1203.03(b)(i) TMEP.

Under this overly broad and vague scope of the term "used," one would logically assume that every unique moniker President Trump "used" in a speech or tweet as President would become his or the U.S. Government's identity. Does it include his use of the mysterious term COVFEFE in his now famous May 31, 2017 tweet? Apparently not, since the USPTO has never refused registration of that term upon the basis that it falsely suggested a connection with President Trump or the U.S. Government. What about President Trump using a term to refer to someone or something else, such as his labeling the leader of North Korea as "Little Rocket Man"? Does President Trump, because of his fame and position, immediately acquire exclusive rights to this moniker? Logically, the answer is "No."

The false suggestion of a connection provision of the Trademark Act is unconstitutional on its face on the ground of vagueness.

VI. 15 U.S.C. § 1052(a) false suggestion of an association is unconstitutional in that it restricts the free speech of artists.

The uncertainty of speech-affecting standards has a chilling effect on speech, especially those of authors of creative works. *See Broadrick v. Oklahoma*, 413 U.S. 601, 613, 615, 93 S. Ct. 2908, 37 L.Ed.2d 830 (1973). Authors, such as Applicant,

must be extremely hesitant to choose a particular mark to use for a movie or comic book franchise since such marks require the expenditure of substantial planning and resources to obtain registration of the mark in the first place. And the author's concerns do not stop there, because even if an author obtains a registration initially, their mark may be challenged in a cancellation proceeding years later under a Section 2(a) false suggestion of a connection claim. This court should hold this provision of the Trademark Laws unconstitutional in that it unduly restricts the free speech of artists.

VII. 15 U.S.C. § 1052(a) false suggestion of an association is unconstitutional in that it violates the common law and the Constitution.

Six years ago, in *Matal v. Tam*, the Supreme Court unanimously held that the Lanham Act's ban, under 15 U.S.C.S. § 1052(a), on the registration of offensive trademarks violates the Free Speech Clause of the First Amendment. See, *Matal v. Tam*, 137 S. Ct. 1744 (2017). More recently, on June 24, 2019, the Supreme Court invalidated the federal registration ban on immoral and scandalous trademarks, finding the "immoral/scandalous clause" in Section 2(a) unconstitutional. See, *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019).

It is noted that under the Patent and Copyrights Clause; United States Constitution, Article I, Section 8, Clause 8, Congress is given the power to grant monopolies only in the limited instances of patent and copyright. Thus, any grant of a monopoly outside of those two areas is an illegitimate legislative amendment to

the U.S. Constitution. President Andrew Jackson is famous for stating, "Distinctions in society will always exist under every just government. Equality of talents, of education, or of wealth cannot be produced by human institutions. In the full enjoyment of the gifts of Heaven and the fruits of superior industry, economy, and virtue, every man is equally entitled to protection by law; but when the laws undertake to add to these natural and just advantages artificial distinctions, to grant titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful, the humble members of society-the farmers, mechanics, and laborers-who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their Government. There are no necessary evils in government. Its evils exist only in its abuses. If it would confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing." President Jackson's Veto Message Regarding the Bank of the United States; July 10, 1832.

The grant of a monopoly in a single word or short phrase that happens to pour forth from the mouth of an elite or famous or powerful person in our society, as in this case, is properly understood as legislation benefiting a "special" class. This court should hold this provision of the Trademark Laws unconstitutional.

The false suggestion of a connection provision of the Trademark Act is unconstitutional in that it violates the common law and the Constitution.

CONCLUSION & REQUEST FOR RELIEF SOUGHT

The Board's evidentiary ruling was clearly unreasonable, arbitrary, or fanciful; based on an erroneous conclusion of law; premised on clearly erroneous findings of fact; or the record contains no evidence on which the Board could rationally base its decision to refuse registration of the subject mark.

Reverse the Board's decision and instruct the application to be published.

Declare the false suggestion of a connection ground for refusal in Section 2(a) of the Trademark Act to be unconstitutional.

Respectfully submitted,

/s/Thomas D. Foster

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January 25, 2024

ADDENDUM

This Opinion is Not a Precedent of the TTAB

Mailed: September 19, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Thomas D. Foster, APC

Serial No. 87981611

Thomas D. Foster of TDFoster – Intellectual Property Law,
for Thomas D. Foster, APC.

Tracy Cross, Trademark Examining Attorney, Law Office 109,
Michael Kazazian, Managing Attorney.

Before Wellington, Heasley and Allard,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Thomas D. Foster, APC ("Applicant"), a corporation, seeks registration on the Principal Register of the standard character mark US SPACE FORCE for the following goods and services:[1]

> "Metal license plates; metal novelty license plates; souvenir license plates of metal" in International Class 6;
>
> "License plate frames; license plate holders" in International Class 12;

[1] Application Serial No. 87981611, filed March 19, 2018 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant's allegation of an intent to use the mark in commerce. The identifications of goods for Classes 16, 18, 21, 24 and 28, are extensive and we therefore summarize these goods.

"Collectible coins; commemorative coins; lapel pins; ornamental lapel pins; jewelry pins for use on hats; jewelry; watches; clocks; decorative key fobs of common metal; leather key chains" in International Class 14;

Various types of books, posters, art prints, magazines, and other stationery items in International Class 16;

Various types of bags, umbrellas, and luggage in International Class 18;

"Accent pillows; bed pillows; floor pillows; novelty pillows; pillows; picture and photograph frames; picture frames; wind chimes" in International Class 20;

Various goods, including beverage and food containers and related accessory goods, in International Class 21;

Various articles, including cloth flags, linen, towels, and blankets, in International Class 24;

Various types of toys, including "toy spacecraft; toy rockets; toy space vehicles; toy figures; toy vehicles; toy weapons; scale model spacecraft; scale model rockets; scale model space vehicles," in International Class 28;

and

"Lighters for smokers; cigar lighters" in International Class 34.

The Examining Attorney has refused registration of the mark for all classes of goods under Section 2(a) of the Trademark Act ("the Act"), 15 U.S.C. § 1052(a), based on false suggestion of a connection with the United States Space Force.

When the refusal was made final, Applicant appealed.[2] The appeal has been briefed.[3]

We affirm the refusal to register.

I. Section 2(a) False Suggestion of a Connection

Section 2(a) of the Act prohibits registration on either the Principal or the Supplemental Register of a designation that consists of or comprises matter that may falsely suggest a connection with "persons, living or dead, institutions, beliefs, or national symbols ...." 15 U.S.C. § 1052(a). "[T]he rights protected under the § 2(a) false suggestion provision are not designed primarily to protect the public, but to protect persons and institutions from exploitation of their persona." *Bridgestone/Firestone Rsch. Inc. v. Auto. Club de l'Ouest de la France*, 245 F.3d 1359, 58 USPQ2d 1460, 1463 (Fed. Cir. 2001) (citing *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 703 F.2d 1372, 217 USPQ 505, 508-09 (Fed. Cir. 1983)). A person, institution, belief or national symbol does not need to be explicitly protected by statute in order to be protected under Section 2(a). *See, e.g.*, *In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218 (Fed. Cir. 2009).

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[2] Prior to the appeal, Applicant filed a request for reconsideration (on January 24, 2020), and this was denied by the Examining Attorney on March 2, 2020.

The application was then remanded to the Examining Attorney at Applicant's request (4-5 TTABVUE) based on "new and compelling evidence." The application was also remanded to the Examining Attorney at the Examining Attorney's request (6-7 TTABVUE) for remand "to address an issue not involved in the appeal that may render the subject mark unregistrable." After the issuance of another final Office Action (on July 6, 2021), Applicant filed a second request for reconsideration (on September 11, 2021), and this was denied by the Examining Attorney (on January 28, 2022). The appeal was then resumed (11 TTABVUE).

[3] 12 TTABVUE (Applicant's appeal brief) and 14 TTABVUE (Examining Attorney's appeal brief).

Also, relevant to this proceeding, the U.S. government, as well as government agencies and instrumentalities, are considered juristic persons or institutions within the meaning of the statute. 15 U.S.C. § 1052(a); Section 45 of the Act, 15 U.S.C. § 1127. *See In re Peter S. Herrick P.A.*, 91 USPQ2d 1505, 1506 (TTAB 2009) ("institutions, as used in Section 2(a), include government agencies."); *U.S. Navy v. United States Mfg. Co.*, 2 USPQ2d 1254, 1257-58 (TTAB 1987) ("the Navy is a juristic person within the meaning of Section 45 of the Act and the Marine Corps might be *argued* to be an institution"); *In re Cotter & Co.*, 228 USPQ 202, 204-05 (TTAB 1985) (finding the United States Military Academy is an institution and West Point "has come to be solely associated with and points uniquely to the United States Military Academy"); *NASA v. Record Chem. Co. Inc.*, 185 USPQ 563, 565-66 (TTAB 1975) (finding the National Aeronautics and Space Administration (NASA) is a juristic person and institution). Thus, common names, acronyms and initialisms for the U.S. government or its agencies or instrumentalities can be relevant to false suggestion of connection claims.

To establish that a proposed mark falsely suggests a connection with a person or an institution, it must be shown that:

> (1) The mark is the same as, or a close approximation of, the name or identity previously used by another person or institution;
>
> (2) The mark would be recognized as such, in that it points uniquely and unmistakably to that person or institution;
>
> (3) The person or institution named by the mark is not connected with the activities performed by the applicant under the mark; and

> (4) The fame or reputation of the person or institution is such that, when the mark is used with the applicant's goods or services, a connection with the person or institution would be presumed.

Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 217 USPQ 508-09 ("the *Univ. of Notre-Dame du Lac* test"). *See also In re Pedersen*, 109 USPQ2d 1185, 1188-89 (TTAB 2013) (citing *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.* in an ex parte appeal context for "providing foundational principles for the current four-part test used by the Board to determine the existence of a false connection"). *See also Piano Factory Grp., v. Schiedmayer Celesta GmbH*, 11 F.4th 1363, 2021 USPQ2d 913, at *11 (Fed. Cir. 2021); *U.S. Olympic Comm. v. Tempting Brands Netherlands B.V.*, 2021 USPQ2d 164, at *17-18 (TTAB 2021); *In re Jackson Int'l Trading Co.*, 103 USPQ2d 1417, 1419 (TTAB 2012); *Buffett v. Chi-Chi's, Inc.*, 226 USPQ 428, 429 (TTAB 1985).

A. US SPACE FORCE is the same as, or a close approximation of, U.S. Space Force

The Examining Attorney asserts that "[t]he evidence of record makes clear that the U.S. Space Force is an agency of the U.S. Government" and "[i]n fact, the U.S. Space Force is the sixth branch of the U.S. military, nested within the Department of the Air Force."[4] In support, she submitted numerous materials, including printouts from the official U.S. military website for the "United States Space Force"

[4] 14 TTABVUE 9.

(www.spaceforce.mil), describing it as a "new military branch" and "independent … within the Department of the Air Force."[5]

Applicant does not argue that its proposed mark is not the same as the U.S. Space Force branch of the U.S. Armed Forces. Indeed, they are identical.

However, Applicant takes issue with the timing of the creation of the military branch vis-à-vis the filing date of its application. Specifically, Applicant contends that:[6]

> The legislative provisions of the 2020 National Defense Authorization Act for the creation of the Space Force, were only signed into law by President Donald Trump during a signing ceremony at Joint Base Andrews on December 20, 2019. The present application was filed on March 19, 2018 - almost two years two years prior to the creation of this new military branch.

In other words, Applicant is relying on the part of "previously used" wording in the first element of the *Univ. of Notre-Dame du Lac* test requiring "by implication that the person or institution with which a connection is falsely suggested must be the prior user." *In re Nuclear Research Corp.*, 16 USPQ2d 1316, 1317 (TTAB 1990) (false suggestion of a connection U.S. Nuclear Regulatory Commission refusal was "ill founded" and reversed by Board because applicant was first user of initialism NRC). *See also* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1203.03(b)(i) (July 2022); J. Thomas McCarthy, 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 19:76 (5TH ed. 2021) ("The phrase 'falsely suggest a connection

[5] July 6, 2021 Office Action, at TSDR p. 5.

[6] 12 TTABVUE 11.

with' in § 2(a) necessarily requires by implication that the person or institution with whom a connection is suggested must be the prior user.").

However, prior use in the context of a false suggestion of a connection is not a question of priority as contemplated in a likelihood of confusion context. Indeed, prior use "may be found when one's right to control the use of its identity is violated, even if the name claimed to be appropriated was never commercially exploited as a trademark or in a manner analogous to trademark use." *In re Pedersen*, 109 USPQ2d at 1193; *see also In re Nieves & Nieves LLC,* 113 USPQ2d 1639, 1644 (TTAB 2015) (ROYAL KATE creates a commercial impression that refers to Kate Middleton even though she has never used the identifier).

In terms of being previously-used, we note that while there were earlier proposed iterations of U.S. military institutions, including "U.S. Space Corps" in 2017 and "Air Force Space Command," it was on June 18, 2018 when the then U.S. President, Donald Trump, announced a "directive to create a sixth branch of the United States Armed Forces."[7] According to official U.S. Space Force website, the U.S. Space Force is "the newest branch of the [U.S.] Armed Forces" and "was established December 20, 2019 with the enactment of the Fiscal Year 2020 National Defense Authorization Act."[8]

The involved application is based on Applicant's allegation that it intends to use the mark in commerce (see Note 1). Applicant does not argue that it is the prior user

[7] July 9, 2018 Office Action, at TSDR pp. 12-13 (from Wikipedia online encyclopedia).

[8] July 6, 2021 Office Action, at TSDR p. 21.

of its proposed mark, but that it "intends to offer goods and services under its [proposed mark]."[9]

Thus, for purposes of the false suggestion refusal, Applicant cannot argue that it is the prior user, and whether or not the U.S. Space Force was officially created or in existence at the time of Applicant's filing date, the fact remains now that the military branch of the U.S. Armed Forces is the prior user. *Cf. In re Nuclear Research Corp.*, 16 USPQ2d 1317 (applicant was owner of use-based registration and Board found it to be "the long prior user of NRC"). Accordingly, Applicant's intended mark is the same as the name as that already being used by the U.S. Space Force, a branch of the U.S. Armed Forces.

B. US SPACE FORCE will be recognized as pointing uniquely and unmistakably to the U.S. Space Force

The record reveals that the U.S. Space Force has received considerable attention since it was first announced in 2018. It has been prominently featured in major news publications, like Newsweek, identifying it as the military branch charged with the mission of "protecting American interests in space."[10] A Time magazine article, "America Really Does Have a Space Force. We Went Inside to See What It Does," describes the U.S. Space Force's role and actions and that it has a budget of $15.4 billion for 2021.[11]

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[9] 12 TTABVUE 8.

[10] October 13, 2020 Office Action, at TSDR p. 21 (from www.newsweek.com, "How to Join U.S. Space Force, America's Newest Branch of the Military," May 15, 2020).

[11] *Id.* at p. 27 (from www.time.com, July 23, 2020).

On January 14, 2020, the then Vice President Mike Pence swore in General John W. Raymond as the "highest-ranking military leader of the newly created U.S. Space Force, adding a prominent White House ceremony that recognized the arrival of the nation's newest, separate branch of the military."[12] The U.S. Space Force's headquarters is located in the Pentagon, along with those of the Army, Navy, Marine Corps and Air Force.[13]

In its brief, Applicant sets forth various reasons it believes the proposed mark "does not point uniquely and unmistakably to the U.S. Government, former President Trump, or the U.S. Space Force."[14] We address these arguments.

1. Netflix Series "Space Force"

On May 29, 2020, a Netflix-original series called "Space Force" premiered that, according to reviews, was inspired by and intended to be a parody of the actual U.S. Space Force.[15] As pointed out by Esquire magazine — under the subtitle "Is Space Force Inspired By the Actual Space Force?" — the "show's drop onto Netflix … is eerily timed with the developments in the actual United States Space Force, a $40 million project that stands as the country's first new military branch since the

[12] July 6, 2021 Office Action, at TSDR p. 20.

[13] *Id.* at 22.

[14] 12 TTABVUE 5.

[15] See, e.g., October 13, 2020 Office Action, at TSDR p. 107 (www.cnn.com, "'Space Force' casts Steve Carell in a broad satire that never achieves liftoff," May 29, 2020, stating that the show is "clearly designed to spoof President Trump's pet military project") and p. 110 (www.theatlantic.com, "Space Force Tells a Terrible Joke About America," stating that "the show was supposedly dreamed up years ago when [then] President Trump announced the founding of the sixth, extraterrestrial branch of the armed forces…").

creation of the Air Force in 1947."[16] The show's plot revolves around a "four-star general reluctantly plucked from his position at the Air Force and placed atop this new sixth branch of the military."[17] A screenshot, displayed in The Atlantic magazine, shows actor Steve Carell playing the general:[18]

 .[19]

Applicant acknowledges that the Netflix "Space Force" series received "high ratings from audiences" and has been viewed by many, but contends that it also provides a reason Applicant's proposed mark "cannot be said to point uniquely and unmistakably" to the U.S. Space Force.[20] Specifically, Applicant argues that "[o]ne might presume that the "U.S. Government, former President Trump, or the U.S.

[16] *Id.* at p. 97.

[17] *Id.* at p. 107.

[18] *Id.* at p. 110.

[19] *Id.*

[20] 12 TTABVUE 16.

Space Force might object to the use of these terms [in the Netflix show], but that is obviously not the case."[21]

Contrary to Applicant's argument, we agree with the Examining Attorney that the existence and apparent success of the Netflix show, and particularly that the U.S. Space Force is the target of the parody, helps show the extent of fame of the military branch of the U.S. Armed Forces. As the Examining Attorney explains, "[m]ultiple seasons of a parody show … regarding the actual U.S. SPACE FORCE … can only add to the governmental entity's cultural relevance, fame and notoriety in the public eye."[22] We further agree with the Examining Attorney that "[a]rguably, a satire's potential success is directly proportional to the fame of the target of the parody."[23] It has long been stated that parodies are usually best made of an entity that is famous or, at least, well-known to the public. *See, e.g., In re Serial Podcast, LLC*, 126 USPQ2d 1061, 1076 (TTAB 2018) (a matter has to be famous or well-known to be the subject of parody). *See also, e.g. Louis Vuitton Malletier S.A. v. Haute Diggity Dog LLC*, 507 F.3d 252 , 84 USPQ2d 1969, 1975 (4th Cir. 2007) ("It is a matter of common sense that the strength of a famous mark allows consumers immediately to perceive the target of the parody, while simultaneously allowing them to recognize the changes to the mark that make the parody funny or biting."); D.S. Welkowitz "Trademark

[21] *Id.* at 17.

[22] 14 TTABVUE 17.

[23] *Id.*

Parody after Hustler Magazine v. Falwell," 11 Comm. & L. 65, 72 (Dec. 1989) ("Hence, a parody, to be effective, virtually requires that it parody a well-known trademark.").

In sum, the Netflix show is an indicator of the U.S. Space Force's renown and further reinforces a direct association of the term U.S. SPACE FORCE with the actual branch of the military.

2. 1987 Animated Television Show "Starcom: the U.S. Space Force" and Associated Collectable Toys

Applicant asserts that U.S. Space Force is "recognized as a type of collectable space related toys associated" with an animated television show called "Starcom: the U.S. Space Force" that aired in 1987.[24] Applicant contends that the "public's continuing familiarity with this show and the associated collectable toys is reflected in the fact that fans still write articles about them."[25] In support, Applicant relies on printouts from online sources, including a Wikipedia entry for the television show, the website "Robot's Pajamas," and a 2014 online review entitled "starcom: the u.s. space force – remember this?"[26] Applicant also submitted printouts showing "Starcom U.S. Space Force" toys offered for sale on Ebay.[27] In addition, Applicant submitted the declaration of Frank Winspur, a hobbyist distributor "with a focus on science fiction, fantasy, and comic related model kits, collectables and toys" and self-proclaimed "expert in the vintage and collectable toy field."[28] Mr. Winspur avers, inter

[24] *Id.* at 15.

[25] *Id.*

[26] Attached to Applicant's response filed January 24, 2020.

[27] *Id.*

[28] 4 TTABVUE 47.

alia, that "U.S. Space Force toys are available for purchase online" and that "there is a sizable number of other space toy collectors that know of and that collect these U.S. Space Force toys."[29]

According to Wikipedia, however, the television show was not very successful and "did not get much of a chance to reach the intended audience before it was cancelled after one brief season." Furthermore, the associated "toy line … was unsuccessful in the North American domestic market."[30]

On this record, it is unlikely that a significant portion of the public will make an association with the short-lived animated television show or collectable toys. Rather, we agree with the Examining Attorney that "[a]ny familiarity with a television show, that a particular segment of the population remembers, would be overshadowed by the prominence of the U.S. Government military branch."[31]

3. Applicant's "Google Survey"

Applicant also submitted a "Google survey" and argues that the "results of this survey show that the term U.S. SPACE FORCE certainly does not point uniquely and unmistakably to a branch of the U.S. military."[32] The survey consists of 3 pages, printouts from the Google website purportedly showing a "start date" of March 22, 2021, with 1,499 "responses."[33] According to the printouts, 997 survey respondents

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[29] *Id.*

[30] Applicant's response filed January 24, 2020, TSDR p. 17.

[31] 14 TTABVUE 15.

[32] 12 TTABVUE 17; Google survey printouts attached to Applicant's April 5, 2021 response, at TSDR pp. 11-14.

[33] *Id.*

were presented with: "The term US SPACE FORCE points uniquely and unmistakably in my mind to:" and offered the following choices: "None of these … A branch of the U.S. military … Donald J. Trump … NASA … a Netflix television show."[34] The percentages of responses given by respondents were, respectively: 24.6% - 22.5% - 22.2% - 20.6% - 10.2%.[35] Applicant argues that "this survey evidence support the common sense argument that the mark no longer points uniquely and unmistakably to" either "the U.S. Government, Former President Trump, or the U.S. Space Force's previously used name or identity or a close approximation."[36]

It is well-established practice for the Board to take a more permissive approach to the admissibility and probative value of evidence in an ex parte proceeding versus treatment of such evidence in an inter partes proceeding. *See, e.g., In re Canine Caviar Pet Foods, Inc.*, 126 USPQ2d 1590, 1597 (TTAB 2018); *In re Sela Products LLC*, 107 USPQ2d 1580, 1584 (TTAB 2013) ("...the Board does not, in ex parte appeals, strictly apply the Federal Rules of Evidence, as it does in inter partes proceedings."). *See also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1208 (June 2022). Nevertheless, we must consider the survey methodology and, in this instance, we have little to no information regarding how the survey was conducted, other than what is purportedly shown in the Google printouts. *In re Van Valkenburgh*, 97 USPQ2d 1757, 1767 (TTAB 2011) (finding "no basis on

[34] *Id.*

[35] *Id.*

[36] 12 TTABVUE 25.

which to conclude that the survey is based on scientifically valid principles" where the survey consisted of questionnaires distributed to an unknown number of people who filled them out and mailed them back to applicant's counsel). Indeed, the survey is not supported by an affidavit or declaration.

In any event, putting aside the flaws that diminish the survey's reliability and overall probative value, the results fail to support Applicant's argument that US Space Force does not point to the branch of the U.S. Armed Forces. As the Examining Attorney points out, three of the possible responses ("A branch of the U.S. military … [former U.S. President] Donald J. Trump … NASA") account for nearly two-thirds of the responses and these responses may be understood as generally pointing to "agencies and instrumentalities of the U.S. Governmental body, acting on its behalf and under its authority" and "all represent the U.S. Government."[37]

4. Applicant's Other Arguments

Applicant argues that the proposed mark "cannot be said to point uniquely and unmistakably" to the U.S. Space Force because the term "Space Force" is a "generic term which refers to the influential persons and enterprises which exert their power and energy towards conducting operations in space [and] does not refer just to the U.S. government and its military."[38] This argument fails because Applicant is ignoring the prefix "US" (or U.S.) and the fact that the proposed mark is US SPACE FORCE, not simply "Space Force." While the term "space force" may refer to other

[37] 14 TTABVUE 14.

[38] 12 TTABVUE 18.

entities or that other countries may have "space forces," is irrelevant; there is only one military branch designated "U.S. Space Force" and the public will readily understand the proposed mark as pointing uniquely to that military branch. As the Examining Attorney makes the comparison, this is "similar to the U.S. Army, U.S. Navy, U.S. Air Force, U.S. Marines or U.S. Coast Guard."[39] Thus, while other countries may have armies, navies, and air forces, when any of these generic terms is prefaced with U.S., it helps point uniquely and unmistakably to a specific military branch within the U.S. Armed Forces.

Applicant also argues that the "U.S. Government, Former President Trump, or the U.S. Space Force … are separate entities" and the Examining Attorney "has not identified one specific entity or person to which the mark identifies."[40] Applicant asserts that "the Examining Attorney has real difficulty identifying the one specific entity or persona to which US SPACE FORCE points," and cites to various Office Actions where the Examining Attorney mentions former President Trump, the U.S. Government, as well as the particular military branch, U.S. Space Force.[41]

The Examining Attorney counters that "[i]n this case, the agencies and instrumentalities of the U.S. Government are its President and its branches of the military,"[42] and "[h]ere, the U.S. Government, through its President, initiated and

[39] 14 TTABVUE 12.

[40] 12 TTABVUE 22.

[41] *Id.* at 22-23.

[42] 14 TTABVUE 10.

began identifying its Space Force before the instant application was filed."[43] The "prior informal references to the US Space Force gave rise to a protectable interest" and "the U.S. Government has rights to control use of this identity."[44]

We agree with the Examining Attorney to the extent that various governmental entities, including the broad term U.S. Government to President Trump to the agency U.S. Space Force, can all be characterized as government instrumentalities and used interchangeably for purposes of explaining the origin and creation of the latest military branch of the U.S. Armed Forces, namely, the U.S. Space Force. Indeed, due to the structure of the U.S. government, a very general term, and the President, who is the Commander in Chief of the U.S. Armed Forces, including the U.S. Space Force, it is certainly feasible that each of these entities may have a role or be attributed with responsibility for the military branch known as U.S. Space Force. It is evident that the then President, Donald Trump, helped create the moniker "U.S. Space Force" and the military branch can be characterized more broadly as part of the U.S. government. None of these facts negates or detracts from Applicant's proposed mark being understood as pointing to that branch of the Armed Forces.

In sum, we are not persuaded by any of Applicant's arguments, but find that the record establishes that Applicant's proposed mark, US SPACE FORCE, will be understood as pointing uniquely and unmistakably to the branch of America's military "U.S. Space Force."

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[43] *Id.* at 11.

[44] *Id.*

C. Applicant has no connection with the U.S. Space Force, but a connection would be incorrectly presumed because of the fame and reputation of the U.S. Space Force

Applicant does not argue that it has any connection or affiliation with the U.S. Space Force and, indeed, the record makes clear that it does not. The evidence also establishes that the U.S. Space Force has received considerable publicity in the relative short time since it was created. As already discussed, President Trump's announcement regarding the creation of U.S. Space Force garnered widespread media attention and various major national news sites have continued to cover the military branch's growth. In addition, U.S. Space Force's popularity is reflected by, and has been accentuated by, multiple seasons of the Netflix show that parodies the military branch.

D. Conclusion

Applicant's proposed mark, US SPACE FORCE, falsely suggests a connection to the U.S. Space Force, a branch of the U.S. Armed Forces and a U.S. governmental institution. The proposed mark is identical to, and points uniquely and unmistakably to this military branch of the U.S. Armed Forces. Because of the U.S. Space Force's fame and reputation, the public would mistakenly believe that Applicant has a connection with the U.S. Space Force should US SPACE FORCE be used by Applicant on the goods identified in the application.

II. Constitutionality Argument

Applicant makes the cursory argument that "the false suggestion of a connection ground for refusal in Section 2(a) violates foundational common law principals and is

unconstitutional and, as such, is ripe for similar review and treatment by the Supreme Court."[45] In support, Applicant relies on the Supreme Court decisions holding that certain provisions of Section 2(a) are no longer valid grounds on which to refuse registration, because they violate the "Free Speech Clause" of the First Amendment to the United States Constitution. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2019 USPQ2d 232043 (2019) (immoral or scandalous marks); *Matal v. Tam*, 137 S. Ct. 1744, 122 USPQ2d 1757 (2017) (disparaging marks). Applicant goes on to argue, without citing any authority, that "any grant of a monopoly outside of [patents and copyrights] is an illegitimate legislative amendment to the U.S. Constitution."[46]

Subsequent to the *Brunetti* and *Tam* decisions, the Board addressed the constitutionality of Section 2(a)'s false suggestion of a connection ground for refusal and ultimately rejected this challenge:

> It is well-settled that "[t]he government may ban forms of communication more likely to deceive the public than inform it ...." *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980). Unlike the disparagement clause found unconstitutional in [*Tam*], or the immoral or scandalous clause struck down in *Brunetti*, the false suggestion clause directly furthers the goal of prevention of consumer deception in source-identifiers. Congress acts well within its authority when it identifies certain types of source-identifiers as being particularly susceptible to deceptive use and enacts restrictions concerning them. *Cf. S.F. Arts &*

[45] 12 TTABVUE 25.

[46] *Id.* In this regard, we point out that Congress' authority to pass laws regarding trademarks emanates from the "Commerce Clause" of the Constitution. *Person's Co., Ltd. v. Christman*, 900 F.2d 1565, 1568 (Fed. Cir. 1990) ("power of the federal government to provide for trademark registration comes only under its commerce power"). There is no dispute this is different from the clause specifically allowing Congress to pass laws to "promote the progress of science and the useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries." U.S. Const. Art. 1, § 8, cl. 8; *Golan v. Holder*, 565 U.S. 302, 132 S. Ct. 873, 887–888 (2012) ("Perhaps counter-intuitively for the contemporary reader, Congress' copyright authority is tied to the progress of science; its patent authority, to the progress of the useful arts.").

> *Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 3 USPQ2d 1145, 1153 (1987) ("Congress reasonably could conclude that most commercial uses of the Olympic words and symbols are likely to be confusing.").

In re Adco Industries - Technologies, L.P. 2020 USPQ2d 53786, *10 (TTAB February 11, 2020). We agree with the reasoning in *In re Adco* and reject Applicant's argument in this appeal that the false suggestion of a connection refusal is unconstitutional.

Decision: The refusal to register Applicant's mark US SPACE FORCE based on a false suggestion of a connection with the U.S. Space Force, under Section 2(a) of the Trademark Act, is affirmed.

This Opinion is Not a Precedent of the TTAB

Mailed: December 12, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Thomas D. Foster, APC.

Serial No. 87981611

Thomas D. Foster of TDFoster — Intellectual Property Law,
for Thomas D. Foster, APC.

Tracy Cross, Trademark Examining Attorney, Law Office 109,
Michael Kazazian, Managing Attorney.

Before Wellington, Heasley, and Allard,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

This now comes before the Board on Applicant's timely Request for Reconsideration of the Board's decision ("Final Decision"), under Trademark Rule 2.144, 37 C.F.R. § 2.144.[1]

[1] 17 TTABVUE (Applicant's Request for Reconsideration) filed on October 17, 2022; 16 TTABVUE (Final Decision) issued on September 19, 2022.

I. Background

Thomas D. Foster, APC ("Applicant"), a corporation, filed an application to register the standard character mark US SPACE FORCE on the Principal Register for various goods and services in International Classes 6, 12, 14, 16, 18, 20, 21, 24, 28 and 34. The application was filed under Section 1(b) of the Trademark Act ("the Act"), 15 U.S.C. § 1051(b), based on Applicant's allegation of an intent to use the mark in commerce.

The Examining Attorney refused registration of the proposed mark for all classes of goods under Section 2(a) of the Act, 15 U.S.C. § 1052(a), based on the proposed mark falsely suggesting a connection with the United States Government, particularly its military forces known as "the U.S. Armed Forces," which now includes the U.S. Space Force service branch.[2] When the refusal was made final, Applicant appealed to this Board.

The Final Decision affirmed the refusal to register the mark. Specifically, this Board applied the *Univ. of Notre-Dame du Lac* test[3] and concluded:[4]

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[2] *See, e.g.*, Wikipedia "United States Space Force," (www.wikipedia.org), printouts attached to Office Action issued on March 2, 2020, at TSDR pp. 109-116 ("The United States Space Force (USSF) is the space operations service branch of the United States Armed Forces, and is one of the eight U.S. uniformed services … and youngest branch of the U.S. Armed Forces.")

[3] *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 703 F.2d 1372, 217 USPQ 505, 508-09 (Fed. Cir. 1983). The test sets forth the elements of false suggestion of a connection ground:

> (1) The mark is the same as, or a close approximation of, the name or identity previously used by another person or institution;
>
> (2) The mark would be recognized as such, in that it points uniquely and unmistakably to that person or institution;

> Applicant's proposed mark, US SPACE FORCE, falsely suggests a connection to the U.S. Space Force, a branch of the U.S. Armed Forces and a U.S. governmental institution. The proposed mark is identical to, and points uniquely and unmistakably to this military branch of the U.S. Armed Forces. Because of the U.S. Space Force's fame and reputation, the public would mistakenly believe that Applicant has a connection with the U.S. Space Force should US SPACE FORCE be used by Applicant on the goods identified in the application.

II. Request for Reconsideration

"Generally, the premise underlying a request for reconsideration … is that, based on the evidence of record and the prevailing authorities, the Board erred in reaching the decision it issued," and such request "normally should be limited to a demonstration that based on the evidence properly of record and the applicable law, the Board's ruling is in error and requires appropriate change." *In re Berkeley Lights, Inc.*, 2022 USPQ2d 1000, at *2 (TTAB 2022) (citing TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") §§ 543 and 1219.01 (2022)).

A. Argument and Analysis

In its Request for Reconsideration, Applicant contends the Board erred in the Final Decision in two areas: 1) that the Board failed to recognize that Applicant is "the tentative prior user based on the filing date of its intent-to-use application";[5] and 2) that there was insufficient evidence for the Board to conclude that Applicant's

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> (3) The person or institution named by the mark is not connected with the activities performed by the applicant under the mark; and
>
> (4) The fame or reputation of the person or institution is such that, when the mark is used with the applicant's goods or services, a connection with the person or institution would be presumed.

[4] 16 TTABVUE 18.

[5] 17 TTABVUE 5.

mark would be recognized "as pointing uniquely and unmistakably to the U.S. Military or any other specific person or institution on or before the March 19, 2018 filing date of the subject application."[6] We address these arguments together.

As explained in the Final Decision, a false suggestion of a connection refusal necessarily requires that the name of the person or institution has been previously used.[7] However, as this Board also clarified in the Final Decision, this 'previous use' is not the same as a determination of priority for likelihood of confusion purposes; rather, in connection with false suggestion of a connection, previous use "may be found when one's right to control the use of its identity is violated, even if the name claimed to be appropriated was never commercially exploited as a trademark or in a manner analogous to trademark use."[8] Applicant does not dispute these propositions.

Applicant, however, takes issue with the following statement in the Final Decision:[9]

> Thus, for purposes of the false suggestion refusal, Applicant cannot argue that it is the prior user, and whether or not the U.S. Space Force was officially created or in existence at the time of Applicant's filing date, the fact remains now that the military branch of the U.S. Armed Forces is the prior user.

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[6] *Id.* at 6.

[7] *Id.* (citing, *inter alia*, *In re Nuclear Research Corp.*, 16 USPQ2d 1316, 1317 (TTAB 1990) and J. Thomas McCarthy, 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 19:76 (5th ed. 2021).

[8] 16 TTABVUE at 7, quoting *In re Pedersen*, 109 USPQ2d 1185, 1193 (TTAB 2013), and also citing *In re Nieves & Nieves LLC*, 113 USPQ2d 1639, 1644 (TTAB 2015)).

[9] *Id.* at 8.

Applicant argues that this is "an incorrect statement of law," because "[t]here is no discussion whatsoever of the intent-to-use provisions of the Trademark Act."[10] Specifically, Applicant refers to Section 7(c) of the Act, 15 U.S.C. § 1057(c), which provides that the filing date of an application "shall constitute constructive use of the mark, conferring a right of priority, nationwide in effect, on or in connection with the goods or services specified in the registration against any other person …," contingent on registration of the mark. Thus, Applicant contends that because "[t]he subject application was filed on March 19, 2018, and it was only on June 18, 2018 when then U.S. President, Donald Trump, announced a 'directive to create a sixth branch of the United States Armed Forces,'" Applicant "clearly has a recognizable claim of priority of use of the subject mark."[11]

Applicant is correct that Section 7(c) of the Act confers upon applicants a right to a constructive use date, based on an application's filing date and contingent on registration. Applicant is further correct that such right is not expressly limited to any particular statutory ground for refusing registration. However, it may reasonably be inferred that Section 7(c) constructive use priority date is only relevant when comparing two marks that are competing for first use or priority, and is not applicable when an applicant's proposed mark was previously used in the context of a false suggestion a connection refusal with previously-used name or identity of a person or institution. That is, Section 7(c) confers a "right of priority, nationwide in effect …

[10] 17 TTABVUE 5.

[11] *Id.* at 6.

against any other person except for a person **whose mark** has not been abandoned and who, prior to such filing [used the mark or filed an application for the mark, or filed a foreign application giving it an earlier filing date]." 15 U.S.C. § 1057(c) (emphasis added).[12] Thus, this section can reasonably be construed to mean that the constructive use date should apply when there are traditional trademarks competing for a "first use" or priority.

On the other hand, we acknowledge that, on at least one occasion and in the context of an inter partes proceeding, the Board has stated in dictum that an applicant may rely on its filing date of an intent-to-use application, or constructive use date, for purposes of defending a false suggestion of a connection claim. *See Miller Brewing Co. v. Anheuser-Busch Inc.*, 27 USPQ2d 1711, 1714 n.2 (TTAB 1993) (in a false suggestion of connection claim "involv[ing] an intent-to-use application, the claim of priority or prior association must predate the defendant's constructive use date"). At least one law journal has also recognized that such reliance may be possible, again in the context of an inter partes proceeding. *See also* Anthony L. Fletcher, David J. Kera, "The Forty-Seventh Year of Administration of the Lanham Trademark Act of 1946," THE TRADEMARK REPORTER, 84 TMR 635, 686 (1994) (stating that a properly pleaded claim of false suggestion of a connection includes plaintiff's allegation that

[12] A review of the legislative history, particularly that dealing with the implementation of the "intent-to-use" basis, under Section 1(b) of the Act, 15 U.S.C. § 1051(b), and particularly its interplay with Section 7(c) of the Act, does not define the intended scope of applicability for an applicant's constructive use date. *See, e.g.*, S. Rep. No. 100–515 (1988) and H.R. Rep. No. 100-1028 (1988). However, again, without confining constructive use priority to any particular ground for refusing registration of a mark, the reports discuss generally the ramifications in the context of one party's mark vis-à-vis another party's mark and what priority date each party can rely upon.

use of the defendant's mark, or its equivalent, designating plaintiff's identity or persona occurred "prior in time to the defendant's use or constructive use date.")

Despite any ambiguity as to the reach of an applicant's constructive use priority date and even according Applicant's filing date of March 19, 2018 as its constructive use date for purposes of the false suggestion of a connection refusal, Applicant is still not the prior user. *Cf., Nuclear Research*, 16 USPQ2d 1317 (false suggestion of a connection with U.S. governmental agency Nuclear Regulatory Commission (NRC) refusal was "ill founded" and because applicant was a "long prior user" of its mark NRC). That is, on March 13, 2018, then-President Trump announced, "We have the Air Force, we'll have the space force."[13] Trump's announcement before an audience of Marines at the Miramar Marine Corps Air Station in San Diego, California was covered in national media.[14] As one national magazine notes, "[t]he idea of a [U.S. Armed Forces] space corps was already a news story—last year" when the House of Representatives passed legislation that would direct the Defense Department to create a 'space corps' as a new military service, housed within the Air Force."[15] In 2017, "a bipartisan [House of Representatives] proposal to create the U.S. Space

[13] Marina Koren, "What Does Trump Mean By 'Space Force'?," The Atlantic (online), March 13, 2018 (www.theatlantic.com), printout of article attached to March 2, 2020 Office Action, TSDR pp. 116-122.

[14] *Id.*, see also Shane Croucher, "What is a Space Force? How a Trump Joke Became 'A Great Idea,'" Newsweek (online), March 14, 2018, printout of article attached, *id.* at pp. 123-129.

[15] *Id.* at p. 123.

Corps, as a military service within the Department of the Air Force …, but was cut from the final bill in negotiations with the U.S. Senate."[16]

In sum, despite the curious and (we assume) coincidental timing of Applicant filing its application only six days after Trump's public announcement, the fact remains that Trump's public announcement using the term "space force" in connection with a branch of the U.S. Armed Forces precedes Applicant's filing date. Moreover, in the year preceding this announcement, the record shows use of the terms "space force" and "space corps" in connection with a new branch of U.S. Armed Forces (see Note 13). Thus, although Trump's directive specifically ordering the U.S. Department of Defense to establish the U.S. Space Force as a branch of the U.S. Armed Forces occurred in June 2018,[17] after Applicant's filing date, albeit by only three months, the record shows that use of the term US Space Force was already being associated with the U.S. Government's military, i.e., the U.S. Armed Forces.

The fact that the U.S. Space Force did come into existence until shortly after Applicant's filing date does not preclude the refusal. *See In re Urbano*, 51 USPQ2d 1776, 1779 (TTAB 1999) ("[W]hile the general public in the United States may or may not have seen the upcoming Olympic games referred to precisely as 'Sydney 2000,' we have no doubt that the general public in the United States would recognize this phrase as referring unambiguously to the upcoming Olympic Games in Sydney, Australia, in the year 2000."). Given Trump's public announcement, and immediate

[16] From Wikipedia's "United States Space Force" entry (www.en.wikipedia.org), printout attached, *id.* at p. 114.

[17] *Id.*

national media coverage thereof, along with the U.S. Government's contemplation of and attempts to create an impending division or branch of the U.S. Armed Forces responsible for space, the term US SPACE FORCE would be understood as pointing uniquely and unmistakably to the U.S. Government's military, the U.S. Armed Forces.

Also, as in *Urbano*, the nomenclature of Applicant's proposed mark is relevant. In *Urbano*, the Board acknowledged the existence of evidence showing the general public's exposure to previous Olympic Games referred to "by their location, followed by the year." *Id.* at 1779.[18] Similarly here, the general public has long been exposed to the names of the other service branches of the U.S. Armed Forces, namely, the U.S. Navy, the U.S. Army, the U.S. Marines Corps, U.S. Coast Guard, and the U.S. Air Force. These names all begin with "U.S.," indicating the branch is part of the United States government, followed by a term that describes the branch's jurisdiction of operations, e.g., sea (Navy), amphibious warfare (Marine Corps), coastal protection (Coast Guard), etc. The U.S. Air Force clearly bears the strongest resemblance and, consequently, the general public familiar with this ubiquitous branch of the U.S. Armed Forces, will understandably perceive US SPACE FORCE as an additional branch of the U.S. Armed Forces, which it is, with operations in and responsible for space. Thus, while the general public may or may not encountered the newest branch

[18] The Board, in *Urbano*, held that some of the evidence had "foundation" and "authenticity" deficiencies because it was submitted via letter of protest, and not by the examining attorney. *Urbana*, 51 USPQ at 1779, Note 6. In this appeal, however, the evidentiary materials we rely upon were all submitted by the Examining Attorney, and we have no such evidentiary deficiencies before us.

of the armed forces referred to precisely as US SPACE FORCE, there is no doubt that the general public would recognize this phrase as "referring unambiguously" to the U.S. Government's military forces, which now includes the U.S. Space Force, since it is consistent with the then-President's announcement and not inconsistent with the US Government's naming convention for its military branches. *Urbana*, 51 USPQ at 1779.

We further disagree with Applicant's contention that the evidence of record was insufficient for purposes of concluding that Applicant's proposed mark would be perceived as pointing uniquely and unmistakably to the U.S. Government's military as of Applicant's filing date. For the reasons explained in the Final Decision and herein, the record is ample and sufficient in this regard. Particularly, we point to the evidence of Trump's public announcement, which received prompt national attention, as well previous U.S. Government efforts to create a branch within the U.S. Armed Forces to handle space operations.

B. Conclusion

This order clarifies the Final Decision inasmuch as we herein have considered Applicant's filing date as a constructive use date for purposes of the false suggestion of a connection refusal on appeal. However, Applicant has not demonstrated that, based on the record evidence and the applicable law, the Final Decision is in error. Applicant's proposed mark falsely suggests a connection with the U.S. Government's military forces, specifically, the U.S. Space Force, a branch of the U.S. Armed Forces.

Decision: Applicant's Request for Reconsideration is denied. The Final Decision stands.

CERTIFICATE OF SERVICE

I certify that on January 25, 2024, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving via third-party commercial carrier the party(ies) at the addresses listed below:

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